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Supreme Court of the United States.

October Term, 1914.

GEORGE B. CHRISTIE, JESSE LOWE and JAMES O. HEYWORTH, Surviving Partners of the Firm of CHRISTIE, LOWE AND HEYWORTH, *Appellants*,
v.
THE UNITED STATES.
} No. 204.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

I. STATEMENT OF THE CASE.

The appellants entered into a contract with the United States on the 19th day of February, 1900, for the construction of three locks and dams on the Warrior River, Alabama, at certain unit prices therein stated (record, pp. 38–41).

The work was completed and accepted in November, 1903 (Finding I, p. 48).

On the 15th of January, 1904, the claimants filed their petition in the Court of Claims, and an amended petition April 7, 1906 (record, p. 1). They claimed damages for delay in permitting the commencement of work (Par. 2, pp. 2–6); for construction of wagon roads (Par. 3, pp. 6, 7); for damages due to greater expense

of excavation and pile driving, owing to the materials being different from what they had been represented in the specifications and drawings forming a part of the contract (Par. 4, pp. 7, 8; Par. 6, p. 10; Par. 8, pp. 10–12); for increased cost of excavation, due to being restrained from sloping the banks to angles of repose as required by the contract (Par. 5, pp. 8–10); for extra work in the construction of additional cofferdams (Par. 9, pp. 12–17); and other items unnecessary to enumerate.

The court made findings of fact (record, pp. 43–63). Judgment was entered in favor of the claimants on the items for damages due to delays for which the Government was responsible (Finding II, pp. 48–50), and for construction of wagon roads (Finding III, pp. 50, 51). It was against them on the other items of their claim.

The opinion of the court was delivered by Judge Howry, and with an official syllabus thereof, will be found in the record, pages 63–87. There is a dissenting opinion by Judge Barney on the item of damages arising from deceptive reports of borings (record, pp. 87–91). The case is reported in 48 Court of Claims Reports, 293.

The claimants have appealed to this court.

The particulars of the findings can best be stated, together with the paragraphs of the specifications bearing on the several branches of the claim in connection with the argument on each branch of the case.

II. ASSIGNMENTS OF ERROR.

The appellants hereby assign the following errors in the opinion and judgment of the Court of Claims:

1. In refusing to award to the claimants damages for the misrepresentations made by the official reports of borings referred to in the contract (Finding IV, "Erroneous and Deceptive Borings," record, pp. 51–54);

for the increased difficulty in pile driving caused by the same misrepresentations in said reports of borings, as stated in Finding VI (record, pp. 57, 58); and the amount stated in Finding VII (record, p. 58), so far as the same arises out of the material in the ground being harder than was shown by the boring sheets.

2. In refusing to allow the claimants $45,000, found in Finding V, "Angles of Repose" (record, pp. 54–56), as the reasonable cost of the excavation and removal of the earth which sloughed into the lock pits and was excavated therefrom by the claimants owing to the refusal of the engineer officer of the United States to allow claimants to slope the banks by means of excavation in the natural banks to angles of repose; as well as in refusing to allow the claimants the sum of $1,183.41, stated in the last paragraph of said Finding V (record, p. 56), as the cost of excavating material under which were buried certain concrete forms.

3. In refusing to allow the claimants the cost of cofferdams built by them on the order of the United States engineer officer in charge, and for which said officer agreed to pay, as found in Finding III, "Cofferdams" (record, pp. 58–60).

III. BRIEF OF ARGUMENT.

1. Erroneous and Deceptive Borings.

THE FACTS SUMMARIZED.

The claim under this item arises out of the facts stated in Finding IV (record, pp. 51–54), as well as in the first three paragraphs of Finding VI, occupying the latter half of p. 56; also Finding VII, p. 58.

The specifications provide (Par. 48, record, p. 28):

"The material to be excavated, as far as known, is shown by borings, drawings of which may be seen at

this office, but bidders must inform and satisfy themselves as to the nature of the material."

The facts stated in Finding IV (record, pp. 51–54) may be summarized as follows:

The borings referred to in the above sentence of the specifications were made by a boring party sent out by the United States under the supervision of an engineer acting under the direction of the resident engineer at Tuscaloosa. The work occupied the boring party from July 12 to November 8, 1899. The ground was staked out for the borings at distances from 50 to 68 feet apart. The borings were made with a water jet forced down through a 1-inch pipe, joined together on the outside by a sleeve or coupling and coming up between the 1-inch pipe and the outer casing of 2-inch pipe and constantly bringing up samples of the materials penetrated. The drill when driven into the ground would sometimes meet obstructions which from the particles broken off and floating to the surface would indicate that they might be logs. These obstructions, though in some instances noted in the original note books of the foremen, were not transferred to the drawings, and do not appear thereon. When such obstructions were met the apparatus was moved elsewhere until a place was found where the drill would penetrate, and the result was recorded as if taken at the place staked out.

The boring sheets referred to in paragraph 48 of the specifications contained only the record of completed borings and do not show any record of sunken logs, or of cemented sand and gravel, or conglomerate inpenetrable by the drill.

The existence of any indication of such buried logs at the time the borings were made was called to the attention of the resident engineer by the engineer in local

charge of the boring parties, and when asked if logs were to be noted in the record of borings, the resident engineer said that he did not consider the logs of enough importance to be noted, and the same were not noted (record, foot p. 52).

It does not appear that this statement was other than an honest expression of the resident engineer's opinion as to the necessity for noting the logs in the record, nor that it was made for the purpose of inducing the engineer in local charge or any other employee of the United States to omit from the record of the borings any material actually encountered, nor for the purpose of concealing the existence of logs from or misleading subsequent bidders. The engineer officer of the United States had no knowledge of the expressed opinion of the resident engineer regarding the noting of anything indicating the presence of logs, nor did said engineer or resident engineer have any knowledge that any incomplete borings had been taken, or that any borings had been taken at points other than indicated on the drawings (record, p. 53).

Borings such as these are generally made by the owner of the works to be constructed, and show truly and fully the existence of all material met, including objects imbedded in the soil, such as logs or stumps, and the definite location of the boring actually made (record, p. 53).

When the work under this contract came to be done, claimants found the materials were more difficult and expensive to penetrate and excavate than ordinary sand, gravel, or clay, such as described or named in said drawings. The buried logs found beneath the surface of the earth as aforesaid, were not described or named in the drawings (record, p. 53).

It is found as to sheet piling (Finding VI, p. 56):

"Many of the sheet piles could not be driven to the desired penetration on account of buried logs and other

obstructions, and in the effort to do this the time of driving said piles was greatly increased.

"Other causes which tended to increase the time and difficulty of the pile driving were:

* * * * * * *

and (5) the most serious delay and difficulty was caused by the nature of the material found in the abutment of Lock 5, extending over two-thirds of the area of the abutment and out for upwards of 50 feet under the dam, which material was classified on the boring sheet as hard clay and shown to be underlaid by hard white sand, very hard white sand, soft sandstone, white and blue clay, and clay. It was found impossible to penetrate this material, and it was necessary to build that part of the abutment structure directly on said clay."

It is also found, Finding VII (record, p. 58), that some of the round foundation piles were ordered much too long for the requirements of the work and "an average of about 30 per cent of the round foundation piles had to be cut off." This was principally for the reason that "the material found at other places than where the test piles were driven was much harder to penetrate."

The number of borings is not stated in the finding but is shown by the report of Colonel Rossell, constituting part of the published Annual Report of the Chief of Engineers for 1900 (p. 2179), where under the heading of "Borings for New Locks," he states:

"A boring party was organized and left Tuscaloosa on a quarter boat on July 12. Locks 4, 5 and 6 were finally located at Pickens Bar, Log Shoal, and Mikes Bar, respectively 282, 298 and 315 miles by river above Mobile. At Lock 4, 53 borings, aggregating 2,153 linear feet in depth, were made; 50 borings, aggregating 2,466 feet, at Lock 5; and 44 borings, aggregating 1,901 feet, at Lock 6. These borings penetrated through strata of sand and gravel into a thick stratum of clay 20 to 35 feet below the river bed, showing pile foundations to be advisable. They were made with a water jet forced down

through 1-inch pipe and coming up between the 1-inch pipe and an outer casing of 2-inch pipe, and constantly bringing up samples of the materials penetrated. Sections of the strata thus ascertained were plotted and exhibited to intending bidders with the other drawings. This work was finished on November 8 and the party disbanded."

Deceptive Character of Borings.

These findings show that the drawings purporting to show the results of the borings were deceptive in two respects:

1. Out of 147 borings shown by Colonel Rossell's report as the total number actually made, 16 were attempted at places where the drill would not penetrate, and of these attempts no record was made, but the drill was moved elsewhere until a place was found where it would penetrate, "and the result was recorded as if taken at the place staked out" (record, middle p. 52). According to engineering practice as stated in Finding IV (p. 53), the report of borings should show "the definite location of the boring actually made." Thus the journal of borings purported to show that there was no impenetrable material but that in every case the drill had penetrated to the desired depth, whereas in 16 out of the 147 borings it had failed to penetrate at the place shown on the drawings and the apparatus had been moved to a place where the material was penetrable to the desired depth.

2. A number of buried logs were discovered in the course of the borings, but these by direction of the resident engineer were omitted from the drawings, although in engineering practice such borings "show truly and fully the existence of all material met, including objects imbedded in the soil, such as logs or stumps," etc. (record, p. 53).

The facts are thus summarized by Judge Barney in his dissenting opinion (pp. 89, 90):

"What are the facts in this case relating to this item as disclosed by the record and the findings? The advertisement for bidders was dated December 20, 1899, and the time for receiving proposals was limited to 12 o'clock noon on the 20th of January, 1900, 31 days, including Sundays and holidays. It is not disclosed when this advertisement came to the notice of the plaintiffs or when their bid was made, but it does appear that their place of business was Chicago, Ill., and it may well be assumed that it was after January 1, 1900, before their representative got to the site of the work. The record from Government reports further shows that the Government had previously made borings on this site to the extent of 6,520 linear feet and to a depth of from 20 to 35 feet below the river bed; and it was drawings of these borings which were shown to the plaintiffs before making their bid and which the specifications say show the materials to be excavated 'as far as known.' It is undisputed and found by the court that these drawings did not show the materials to be excavated 'as far as known' to the defendants. On the contrary, 16 borings where obstructions had been encountered and at least three borings where sunken logs had been encountered had been made which were not shown on the drawings at all. In fact the only information which the Government had obtained through these borings which it was important the plaintiffs should know before making their bid was omitted from the drawings."

The majority opinion confuses the question by basing its ruling on the proposition that the borings, when made, were intended to locate foundations for the work and that the resident engineer, with that in view, intended no actual fraud when obstructions were ignored and the borings taken at points away from the stations shown on the sheets. But the findings show that thereafter the resident engineer and other agents of the Gov-

ernment, concealing these matters, made the boring sheets a part of the contract for another purpose and stated that those sheets showed the material to be excavated "as far as known."

Thus there are four elements of misrepresentation *by the contract and the boring sheets*, namely:

1. It was represented by the contract and sheets that, "as far as known," no obstructions, such as logs, and no impenetrable materials were encountered at any of the borings, whereas logs and such materials were encountered at many of the borings and this was concealed.

2. It was represented by the contract and sheets, without qualification, that each boring had been made at the corresponding station indicated on the sheets, whereas many borings had been made at other and different points from those represented, the drill having been moved from the indicated point whenever it encountered obstructions or impenetrable material there until successive attempts found a point at which penetration to depth could be made, all of which was concealed.

3. It was represented by the contract and sheets, as a result of the manipulation just discussed, that, "as far as known," certain readily penetrable materials were found at each boring station represented on the sheets, whereas the penetrable materials so shown as at those points had, in fact, been encountered at other and different points nowhere indicated or shown on the boring sheets.

4. It was represented by the contract and sheets, without qualification, that at each and every station indicated and represented on those sheets the water jet bore had there penetrated to that depth to which it was required that the piles should thereafter be sunk, whereas at many of those stations the boring had not penetrated,

and could not penetrate, to anything like the required depth, while the *apparent* penetration at those stations had, in fact, been obtained by searching until a penetrable area was found elsewhere and by crediting that area to the indicated station, all of which was concealed by the boring sheets.

These are not mere misrepresentations as to the nature of the material. They are also misrepresentations as to the actual, not the indicated, stations of boring and as to the actual points at which a water jet boring could penetrate to depth.

The opinion of the majority of the court (record, pp. 70–76) holds that the claimants are not entitled to recover damages suffered on account of these misrepresentations.

The misrepresentations thus made in the boring sheets, both in showing that the ground was everywhere penetrable by the drill to a depth of from 20 to 35 feet below the surface of the ground, and in the absence of any indication of buried logs and stumps, although such were found by the borers, went to an essential point inducing the contract. They constitute a violation of the warranty made by Par. 48 of the specifications (record, p. 28): "The material to be excavated, as far as known, is shown by borings," etc.

Hollerbach *v.* United States.

The recent case of *Hollerbach* v. *United States*, 233 U. S. 165, opinion by Mr. Justice Day, is conclusive.

The following are excerpts from that opinion (pp. 171, 172):

"In paragraph 33 the Government sets forth with particularity a description of the old dam, its length and width, and it was there added: 'The dam is now backed for about 50 feet with broken stone, sawdust and sediment to a height of within 2 or 3 feet of the crest,' etc. The specifications provided that the excavations behind the dam must be to the bottom. In the light of this

specification, turn to the finding of fact, and we learn that the claimants, as they proceeded with the work, found that the dam 'was not backed with broken stone, sawdust and sediment as stated in paragraph 33 of the specifications,' and below seven feet from the top to the bottom there was a backing of cribbing of an average height of 4.3 feet of sound logs filled with stone. Obviously, this made it much more expensive to do the work than if the representation inserted by the Government in the specifications of its own preparation had been true and only the character of material had been found which the specification unequivocally asserted was there.

"A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. In paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True, the claimants might have penetrated the seven feet of soft slushy sediment by means which would have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity. See *United States* v. *Stage Co.*, 199 U. S. 414, 424.

"It follows that the judgment of the Court of Claims must be reversed and the case remanded to that court with directions to enter judgment for the claimants for the damages incurred because of the different character of material found behind the dam than that described in the specifications."

In the *Hollerbach* case the misleading description in the specifications was that of an old work, the character of which had probably been forgotten. At all events, there was no claim that the misrepresentation was intentional.

In the present case the drawings referred to in the specifications purported to embody the results of a recent official investigation. The boring sheets instead of embodying the true results of the borers' investigations were so framed as to make it appear both that the borings were taken at different points from those at which they actually were taken and that logs and stumps were not found by the boring party when in fact they were, and that at each designated station every single boring by the water jet had penetrated there to the required depth.

That the contract at bar provided that bidders "must inform and satisfy themselves as to the nature of the material" is without any effect on the principle stated by this court in the opinion above quoted; even were it granted *arguendo* that those words of the contract included logs and the matter of penetration to depth at each point, as well as the "nature of the material," and further granted *arguendo* that bidders could make their own borings and prepare and tender their bids all within some thirty days.

PEARSON *v.* DUBLIN CORPORATION.

Pearson v. *Dublin Corporation*, 1907 Appeal Cases, 351, decided by the House of Lords, was an action by

contractors for engineering works against the Corporation of Dublin, Ireland. The contract provided (p. 351):

"That the contractor should satisfy himself as to the dimensions, levels and nature of all existing works and other things connected with the contract works; that the corporation did not hold itself responsible for the accuracy of the information as to the sections or foundations of existing walls and works; and that no charges for extra work or otherwise would be allowed in consequence of incorrect information or inaccuracies in the drawings or specifications."

The plans which formed a part of the contract made certain representations as to the existence and position of a certain wall. After full performance the contractors brought an action for damages for false representations as to the position, dimensions and foundations of the wall, whereby they were compelled to execute more costly works than would otherwise have been required. The plans, drawings and specifications were prepared by engineers employed by the corporation. The judges, as usual in the House of Lords, delivered separate opinions. All concurred in holding that the corporation was liable for "statements made either with a knowledge of their falsity, or (which is the same thing) with a reckless indifference whether they were true or false, on the part of the engineers employed by the defendants to make the plans which were submitted to plaintiffs as the basis of the tender" (p. 353).

Concerning the clauses protecting the corporation against inaccuracies and requiring bidders to verify the plans and inform themselves independently, Lord Loreburn, Lord Chancellor, said (pp. 353, 354):

"Now it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them.

I will not say that a man himself innocent may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents. It suffices to say that in my opinion the clauses before us do not admit of such a construction. They contemplate honesty on both sides and protect only against honest mistakes. The principal and the agent are one, and it does not signify which of them made the incriminating statement or which of them possessed the guilty knowledge."

Lord James of Hereford, treating a defense which will doubtless be urged in the present case, said (p. 361):

"In the first place, it was said that the plans were furnished by the engineers to the defendants, who are innocent of personal deceit. They passed the plans on, and so they innocently made the representation not knowing of its untruth. The engineers, who knew of the nature of the representations, made no communication to the tenderers. I can not admit the soundness of this argument. The engineers were employed by the Corporation as their agents to make the plans for the purpose of being communicated to the plaintiffs and others. In the course of this agency the alleged deceit was committed. Of course, the defendants did not personally test the accuracy of the plans, but when they passed them on they surely must bear the burden of their agents' conduct, and can not repudiate the wrongful representations upon which they to a certain extent invited the tenderers to rely."

Lord Atkinson, referring to a contention of counsel for the defendants, said (p. 366):

"They did not rely upon the distinction between conscious and unconscious fraud at all, but contended that on a true construction of the contract, incorporating as it does the plans and specifications, it was plain that the only representations made to the plaintiffs were made by the defendants themselves, not by their engineers; that it

was admitted they themselves gave to the plaintiffs such information as they had; that they did so innocently believing it to be true; that they did not warrant this information to be accurate; that they were therefore not responsible for the fraud of their engineers, if fraud there was; and that it was perfectly legitimate for them to protect themselves, as they contended that they had protected themselves, by this Art. 43 and the other articles referred to, and that they were therefore in point of law entitled to the direction their counsel had asked for and obtained."

Treating this view, it was said (p. 367):

"The tender was to be based upon these plans. The work was to be carried out in accordance with them. The engineers were therefore, by the express terms of the contract, constituted the agents of the defendants to draw up the plans which must of necessity be communicated to or supplied to the contractor. Both the engineers and the defendants must, I think, be held to have intended that the plans should be so communicated or supplied. The engineers were admittedly acting within the scope of their authority in preparing the plans and forwarding them to the defendants or to their committee or their town clerk for transmission to the contractor. The committee was simply the medium through which the plans were to be transmitted; they had no power to alter them in any way. And it would appear to me that the representations contained in these plans might under these circumstances be held, as a matter of fact, to have been made by the engineers to the contractors as truly as if the documents had been sent by the engineers to them through the post, or by the hand of a messenger. I think, therefore, that the defendants are responsible for the fraud of the engineers in framing the plans, if fraud there were."

The corporation was therefore held liable to the contractors for all the damages occasioned to them by the misrepresentations made in the plans upon which the contract was based.

The similarity of the present case to the one from which we have just quoted is obvious. Here, as there, the drawings purporting to show the conditions at the site of the work were drawn so as to show different and more favorable conditions from those known to exist. If there is any difference, the misrepresentation was more intentional and direct in the present case than it was in the one cited. Here the drawings purporting to show the result of the borings were falsified by those making them, and in part by the express direction of the Resident Engineer of the United States.

BOYD & FORREST *v.* GLASGOW & S. W. RAILWAY.

A thorough examination of the purpose of borings in engineering and the circumstances under which owners may be liable for misrepresentations made in them is contained in the case of *Boyd & Forrest* v. *Glasgow & South Western Railway Company*, decided by the Scotch Court of Session February 7, 1914. The case has been before the courts a number of times, a previous judgment in favor of the plaintiffs (the contractors) on the ground of intentional fraud having been reversed by the House of Lords on the facts (1913 Appeal Cases, 404). The Scotch Court of Session upon a remand held that notwithstanding the absence of intentional fraud, the contractors might recover on the ground of essential misrepresentation inducing the contract. The opinions quoted below are those rendered on the last hearing of the case.

The Lord Justice Clerk said (1914 1 Scots Law Times Reports, 176, 177):

"It would appear from what the defenders maintain that it is not necessary in their view to inform the contractor of what was reported by the borers, but only of what the employers of the borers thought should have

been in the report, and that a statement of what is called a journal of bores may be an expression of what one who did not take the bores thinks was the material found, the borers having as he thinks made mistakes or written in names by clerical error, and that selected bores may be given as being the bores taken. To that I can not assent. A journal of bores must be assumed to be a statement of the borer, stating what in his judgment he found, not a statement of some one else of what they think he found. The journal should contain the borer's facts. Any explanation or expression of doubt by any one else may be appended for consideration, but the contractor is entitled to form his own opinion of the facts stated, and of any explanations or views of others, if they think fit to add them. If he was told the borer's statement and an explanation was given that it was not supposed to be correct, he would undoubtedly make inquiry and satisfy himself. The judgment of others in the form of a journal which the borer never issued, is not to be put before him as being the fact stated by the borer.

"It is very plain that if the pursuers had been told that the borers had reported 'hard,' 'rock,' 'whinstone,' they would have considered these reports, and formed their own opinion as to whether their tender should be calculated on taking the strata as hard, or whether they would be satisfied with the explanations and emendations of the engineer, and tender on the footing of 'soft,' or whether they would tender at all, until they had more satisfactory information or facts, on which they might proceed with prudent regard to their own interests.

"The defenders founded strongly on the clause in the contract whereby the contractor is bound to satisfy himself as to the completeness and accuracy of the schedules, and by which he is made to understand that 'no allowance will be made should the material turn out to be different from what is calculated in the schedule;' and further as regards the bores, the notification that 'the company does not in any way guarantee their accuracy, or that they will be a guide to the surrounding strata.'

"I can not think that these are reasonable contentions in the circumstances. Had they supplied journals of bores, stating the facts as the borers stated them, then the clause would have applied if it turned out that the conclusions put down by borers of such competency that the defenders might be justified in employing them were erroneous, even to the effect of being detrimental to the contractors. In such a case the only question that could have arisen would be the question whether they had professed to give the reports of competent borers, when they knew that those they had employed were incompetent. But it is difficult to see how this clause can be founded on when what was supplied as 'journal of bores' was as regards this most essential part, a statement or opinion that the facts contained in the borers' reports were not true facts and that they found something else than what they said in their report they had found."

Lord Dundas said (pp. 180, 181):

"The matter of the bores is one of vital importance; it lies at the very root of the contract. I need not labor the point which I do not think was seriously disputed; but may refer to and hold as repeated what I stated before in my previous opinion.

"The specification stated that 'bores have been put down at various parts of the line, the positions of which are shown on a small scale plan, and a copy of the journal of these bores may be seen at the engineer's office.' As matter of fair construction of these words I think the defenders represented to the pursuers and the pursuers were entitled to believe, that the small scale plan showed the positions of all bores which had been put down on the line; that they could see at the engineer's office the accurate and complete journal of all these bores, as reported by the borers to the company; and that the bores had been made by borers whom the defenders considered to be competent. If these conditions were not complied with I think there was misrepresentation by the defenders to the pursuers, however innocent may have been the

motives of the former in editing or revising the borers' actual journals, or in not divulging part of what the borers had in fact reported." * * *

"The defenders, however, rely strongly upon certain clauses in the specification as being sufficient to protect them, even assuming (which they deny) that any misrepresentation was innocently made to the pursuers. The clauses, it was conceded, would not avail in the case of fraud, but are, it was contended, amply sufficient to cover that of misrepresentation or concealment, short of fraud, however serious the consequences might prove to the contractor. The passage already quoted from the specification is immediately followed by the words 'but the company does not in any way guarantee their' (*i. e.* the bores) 'accuracy, or that they will be a guide to the surrounding strata; contractors must therefore satisfy themselves as to the nature of the strata, as the company will not hold themselves liable for any claim that may be made against them on account of any inaccuracy in the journals of the bores.' Other passages relied on by the defenders' counsel will be found in the Appendix. I am unable to see that any of the protecting clauses, comprehensive as their language is, can cover a case where the contractor has *ex hypothesi* been led into serious error, involving corresponding loss by misrepresentation and concealment (though not fraudulent) on the part of the company in regard to the true journal of their bores. The accuracy of the bores is not guaranteed; but I think there was a representation amounting to an implied guarantee, that the journal exhibited disclosed a full and true account of the borers' reports of all the bores they had put down."

And (p. 182):

"I consider that the pursuers entered into this contract under essential error induced by misrepresentation and concealment (though without any fraud) on the part of the defenders in regard to the journal of the bores."

Covering a defense which will doubtless be urged in this case, the same judge said (p. 182):

"I think it is idle for the defenders to rely on the fact that only a small number, at the worst, out of the total number of the bores was incorrect. It is not a question of how many bores were wrong, but of the result to the pursuers' work of such errors as existed. A small number of bores being wrong might well dislocate the contractor's scheme of operation over a great part or even the whole of his contract."

Lord Salvesen said (p. 188):

"I hold, therefore, that the statements in the specification that bores had been put down at various parts of the line, and that a copy of the journal of these bores might be seen at the engineer's office, was a grave misrepresentation of the facts as now ascertained—(1) with respect that all the bores actually taken were not disclosed, and (2) that the journals were not accurate records of the borers' reports. On the evidence I can not doubt that the contractors were misled by their reliance on the copy journal, and that the slump sum for which they contracted to do the work was affected to a material extent by this reliance. In making their tender I hold that they were under essential error, induced by misrepresentations as to the bores, to which I have already referred in detail."

The same judge said (p. 189):

"I have already indicated that in my opinion the completeness and accuracy of the journal of bores did go to the root of the contract; for it was the only information supplied to the contractors as to the nature of the work which fell to be performed; and, as has already been pointed out by several of the judges, the inaccuracy of the journal of bores in one cutting did not necessarily affect only the work there but might affect the construction of other sections of the line. The engineer who designed the railway no doubt had in view the use of the

soft material excavated from this cutting in making up embankments, and of the hard for building and ballasting. Any disproportion of hard material which was unsuitable either for building or ballasting would obviously affect the contractors' whole calculations in pricing the contract."

See also *Langley* v. *Rouss*, 77 N. E. Rep. 1168, 1171, 185 New York, 201, 209; *Water Commissioners* v. *Robbins*, 74 Atlantic Reporter, 938; *Delafield* v. *Westfield*, 28 N. Y. Supp. 440, 443, affirmed 169 N. Y. 582; *Sharp* v. *Mayor of New York*, 40 Barbour, 256, 269.

The misrepresentation was thus on an essential point, constituting an inducement to the builders to enter into the contract. It constituted a breach of the warranty that the material to be excavated, "*as far as known*," was shown by the borings exhibited to intending contractors.

Hingston *v.* Smith Company.

In *Hingston* v. *Smith Company*, 114 Fed. Rep. 294, where as in this case a complaint was made of false representations of the material below the surface of the earth, the Circuit Court of Appeals for the Sixth Circuit in an opinion by Judge, now Mr. Justice, Day, says (p. 296):

"The matters directly before the party which may be observed he must be presumed to see. But does the reason or the justice of the rule apply where the subject-matter is not present, but distant from the contracting parties? In such case, where the party making the representation has had means and opportunities to know the facts concerning the subject-matter of the contract which the other party has not had, and can not have without going to the expense and delay of an investigation of matters at a distance, we see no reason why he may not rely upon such representations of fact. In our opinion, the party making such representations can not be heard to say, 'Their falsity might have been known by an investigation of the facts, and had the other party not been so

credulous as to rely upon my representations he would not have been deceived.' The rule is thus stated in Bigelow, Frauds, 67:

"'Every contracting party not in actual fault has a right, however, to rely upon the express statement of an existing fact, the truth of which is known to the contracting party who made it, and unknown to the party to whom it is made, when such statement is the basis of a mutual engagement. He is under no obligation to investigate and verify the statement, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.'"

SIMPSON *v.* UNITED STATES, 172 U. S. 272.

The case bears little resemblance to *Simpson* v. *United States*, 172 U. S. 372, referred to in the opinion of the court below (record, p. 75).

There no borings were referred to in the specifications or elsewhere in the contract. The borings were made entirely outside of any requirements for them in the specifications. There was no claim that the reports of borings failed to disclose exactly what the borers found, although as it turned out different conditions existed from what the contractors would naturally infer from the borings.

Here the reference to the borings is incorporated in the contract itself, and the reports did not truly disclose what the borers found.

WHAT CONSTITUTES MISREPRESENTATION.

In *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 404, the law was thus stated:

"The charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and

in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge."

So too, in *Smith* v. *Richards*, 13 Peters, 26, 36, 37:

"Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally in morals and law, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party."

In *Cooper* v. *Schlesinger*, 111 U. S. 148, 155, it was held that "the jury were properly instructed, that a statement recklessly made, without knowledge of its truth, was a false statement knowingly made, within the settled rule."

In the light of these principles the findings of the learned court below as to the good intentions of the resident engineer as well as to the ignorance of the engineer officer are beside the point.

MISREPRESENTATIONS BY AGENTS OF UNITED STATES.

The borings were made by agents of the United States. It matters not what was their rank or degree in the scale of official hierarchy. If they observed and knew the essential facts and did not actually report those facts upon the boring sheets their default was the default of the United States.

As was said by this court in *The Floyd Acceptances*, 7 Wall. 666, 676:

" But the government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly officers. These are many, and have various and diverse powers confided to them."

If agents were appointed to make borings and these agents reported the results of the borings, and those reports were by lawful authority exhibited to intending bidders as accurate representations of what had been found by the borings, then any false statements made in those reports were the false statements of the United States.

Moreover, the resident engineer who personally gave the direction for the omission of any mention of the logs and stumps on the boring sheets was an agent of the United States, named in the advertisement for proposals (record, foot p. 21). Important powers were conferred upon him by the specifications (Paragraph 78, last sub-paragraph, p. 36).

He gave the instruction that logs and stumps were to be omitted from the record of borings (record, foot p. 52). The boring party " which was under the immediate supervision of an engineer employed by the United States " (Finding IV, p. 51), represented on the boring sheets that the borings went down to the required depth at the staked out locations. In fact the material at those locations had proved impenetrable and the boring was actually made at some other place where the rod would penetrate, " and the result was recorded as if taken at the place staked out " (record, p. 52).

Both these practices were contrary to well established customs of engineers. It is found (record, p. 53):

"Borings such as these are generally made by the owner of the works to be constructed and show truly and fully the existence of all material met, including objects imbedded in the soil, such as logs or stumps, and the definite location of the boring actually made."

CONTRACTORS RIGHTLY RELIED UPON REPRESENTATIONS.

Reference is made in the findings as well as in the opinion to certain reports of the Chief of Engineers of the Army showing that snag boats were operated between Tuscaloosa and Demopolis, Alabama, for the removal of stumps and sunken logs, full descriptions of which were reported annually in the reports of the Chief of Engineers. These snags were sticking out of the surface of the ground and perhaps some of them were under water. They have nothing to do with logs imbedded out of sight in the earth beneath the surface of the ground and under both the water and the earth. Moreover in law the argument is absolutely without force. It amounts in its ultimate analysis to this: "True, we represented by these boring sheets that borings had penetrated from 20 to 35 feet into the surface of the earth at 147 different places. True, as a matter of fact in 16 of these places or about 11 per cent of the number the drill could not penetrate; and borings showing actual penetration were taken at other points than those at which it falsely appears on the boring sheets that they were taken. True, it is also, that obstructions of great importance which would be encountered in the course of excavation and pile driving were intentionally concealed when we came to make up the sheets showing the results of the borings. But it was your own folly to rely upon our statements. You should have known that we were deceiving you. You should have known that the drill was not likely to penetrate everywhere, and that although these boring sheets showed that the drill penetrated from 20 to 35 feet below the

river bed at 147 locations there must have been a number of these places where impenetrable material was actually met with. You should have known that these sunken logs might be expected to be found imbedded in the earth, even though we falsely represented to you that none had been found there." Stated in this way,—and we have fairly and fully given the exact facts disclosed by the finding,—the argument is as repugnant to the principles of business morality as it is to those of jurisprudence.

That great jurist, Judge Cooley, in *Eaton* v. *Winnie*, 20 Michigan, 156, says (p. 166):

"When one assumes to have knowledge upon a subject of which another may well be ignorant, and knowingly makes false statements regarding it, upon which the other relies to his injury; we do not think it lies with him to say that the party who took his word and relied upon it as that of an honest and truthful man was guilty of negligence in so doing, so as to be precluded from recovering compensation for the injury which was inflicted upon him under cover of the falsehood."

So also in the English Chancery case of *Reynell* v. *Sprye*, 1 De Gex, Macnaghten & Gordon, 660, the court said (p. 710):

"However negligent the party may have been to whom the incorrect statement may have been made, yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of what he has himself stated."

It is indeed said in the findings (near top p. 53) that the claimants "made no inquiry or independent investigation as to the probable existence of imbedded logs or drift in the material to be excavated, nor did they inquire or attempt to ascertain by what method said borings had been made or the time expended in making them."

Why should they? The borings were made by the

United States, and were proffered by the Government as the authentic results of official investigation. They had taken nearly four months to make, while the time allowed for bidding was but one month from the date of the advertisement. Of whom should they make inquiry? As suggested in *Old Colony Trust Company* v. *Dubuque Light & Traction Company*, 89 Fed. 794, 801, 802, all they could do was to ask some one else, whose statements when obtained would be less reliable than those already formally made to them by the other party to the contract.

The Claim Made at the Proper Time.

It is objected to this item in the opinion of the court below (record, p. 74):

"The right to rescind was never claimed. The right to be reimbursed for damages was never preferred."

The claimants were under no obligation to stop all work under the contract and claim rescission. It was much more advantageous to the Government for them to go on and complete their work and then sue for damages,—a course impliedly approved by this court in *Hollerbach* v. *United States*, 233 U. S. 165.

As to preferring "The right to be reimbursed for damages"—unliquidated damages, it will be noted—such a claim made to executive officers would have been futile and frivolous. They could pay only the prices mentioned in the written contract. Of a claim like this the Court of Claims has exclusive jurisdiction. *Cramp Company* v. *United States*, 216 U. S. 494, 500.

Damages.

The Court of Claims finds (end Finding IV, p. 54):

"The additional expense and value of said excavation over and above what it would have been if the boring

sheets had represented the character of the ground with respect to logs, was $6,150."

This amount is only the additional cost due to the presence of logs. The buried logs and stumps, however, were but one of the misrepresentations made by the boring sheets. The $6,150 found by the court in Finding IV is therefore an insufficient measure of the claimants' damages for the misrepresentations.

Also (end Finding VI, pp. 57, 58):

"The total cost of driving the foundation piles was $18,209.65 and of driving the sheet piles $26,911.23. How much of this cost was due to the presence of buried logs encountered in making the original borings but not shown on the permanent records is not definitely shown by the evidence."

Here, too, no deception but the concealment of the existence of buried logs is referred to.

Finding VII (p. 58) is for the excessive length of piles required of the contractor by Paragraph 52 of the specifications (record, p. 29). These piles were to be driven by the contractor and upon the information so furnished the engineer officer was to prescribe the length of all piles to be furnished for the work.

By paragraph 76 of the specifications (record, foot p. 35) "pile heads cut off above grade to be estimated and paid for at one-third the contract price." An average of about 30 per cent of the round foundation piles had to be cut off. One reason was, "The material found at other places than where the test piles were driven was much harder to penetrate" (record, p. 52). Hence the loss of two-thirds of the contract price for 30 per cent of piles so furnished and cut off is attributable to the misrepresentation of the boring sheets.

The amount thus lost to the claimants was largely due

to the material through which the piles were to be driven proving impenetrable, when they had been led by the boring sheets to suppose it to be everywhere penetrable.

The circumstances are quite similar to those in *Railway Company* v. *Donnegan*, 111 Ind. 179, 190, 191; and also bear some resemblance to those in *Bayne* v. *United States*, 195 Fed. 236.

Depending, as do these items as to the piles, upon the character of the ground having been misrepresented by the boring sheets, they should be reconsidered by the Court of Claims, if the United States is held to be liable for the misrepresentations.

It is therefore requested that the judgment of the Court of Claims upon the facts found in Finding IV, pp. 51 to 54, Finding VI, pp. 56 to 58, and Finding VII, p. 58, be reversed and the case remanded with direction to award the claimants damages for the loss sustained by them by reason of the material being different in character and content from that represented on the boring sheets.

2. Banks Not Sloped to Angles of Repose.

The Facts Summarized.

The facts upon which this item depends are contained in Finding V (record, pp. 54–56). The question involved depends upon the following provision at the end of Paragraph 48 of the specifications (middle p. 28):

"The limits of the excavation and quantities to be excavated will depend upon the ascertained angles of repose. The limits shown on the drawings and the amounts herein given are approximate, and may be greater or less as the local conditions may demand or justify."

By direction of the engineer officer the slopes of all temporary excavation at the lock sites were staked out on an angle of 1 on 1, or 45 degrees from horizontal (Finding V, 1st paragraph, record, p. 54).

It is further found (top p. 55):

"The angle of 1 on 1 prescribed by the engineer officer was an angle at which the banks would stand for the time necessary to complete the work when not submerged from rises in the river or when in a dry condition."

It is also found (near foot of p. 54):

"During every working season, with few exceptions, at least one rise in the river occurs which affects the stability of the slope of the bank and causes it to slough, and during every year there are liable to be more frequent rises."

It is also found (foot p. 54), that the conditions actually encountered during the working season of 1900 and 1901 were abnormal, there being a series of floods, freshets, and rises of the Warrior River more numerous and of greater height and longer duration than theretofore disclosed by official records of the engineer's office.

It is also found (p. 55):

"There was no angle or slope which could have been adopted by which the banks would remain stable when subjected to such rises of the river as were liable to happen in times of flood."

Further findings are as follows (p. 55):

"When the river rose the material in the banks became saturated and heavy with water, and as the river receded such material, being deprived of the support afforded by the water while up, sloughed or caved off into the lock pits below, where it had to be and was removed by claimants in a wet and slimy condition at a higher cost than if excavated from its natural position in the bank.

"The slopes of the excavation were not flattened by the engineer officers because, in their opinion, there was no practical angle at which the banks could have been sloped which would have caused them to remain stable

under the abnormal conditions to which they were subjected, or have prevented the banks from sloughing and caving as the floods and rises in the river receded."

The enormous damages caused claimants through not being permitted to slope these banks to an angle at which they would remain in repose is shown by the finding of the court that at the three locks no less than 45,000 cubic yards of earth sloughed off of the banks as the result of rises in the river, and that the reasonable cost of the removal of these 45,000 cubic yards over and above the contract price which was paid to claimants was $1 per cubic yard, or $45,000.

The contract price was slightly different at each of the three locks (contract, record, foot p. 38), but averaged about 30 cents a cubic yard.

The result of the refusal of the engineer officer to allow the bank to be sloped by the excavation of the earth from the place where nature had put it was that the contractors were put to an expense of $45,000 by the material sloughing into the lock pits and having to be removed therefrom in a wet and slimy condition.

Was it within the power of the officers of the Government by fixing as an angle of repose an angle at which the banks would *not* remain in repose to compel the contractors to do the work at a cost of fully four times the price they were getting for it?

"Angles of Repose" Defined.

The Standard Dictionary thus defines "angle of repose":

"The maximum angle with the horizontal at which a mass of material, as in a cut or embankment, will lie without sliding."

To the same effect are the definitions given in the Century

Dictionary, in Murray's Oxford Dictionary, in Knight's Mechanical Dictionary, and in Goodchild and Tweney's Technological and Scientific Dictionary.

True, it is found that the successive engineer officers at the work put a different meaning upon this term from that contained in authoritative journals, dictionaries, and other authorities. It is found (p. 54):

"Col. Rossell and Col. Cosby, his successor, construed the term 'angle of repose,' as used in the specifications, to mean the angle or slope at which the material would stand the ordinary wear and tear of the weather under normal conditions for sufficient time to allow the work to be done for which the excavation was made."

No definition found by us in any authority contains any such qualification as "ordinary" as applied to wear and tear of the weather or "normal" as qualifying conditions.

POWER OF THE ENGINEER.

The Court of Claims decided adversely to this item on the ground that Paragragh 89 (record, p. 38) stated that the engineer officer would explain any doubt as to the meaning, or obscurity in the wording of the specifications and should have the right to correct any errors or omissions that might become apparent. Also, on the ground that Paragraph 78 (last sentence, foot p. 36) made the "decision" of the engineer officer final without appeal "in all cases of dispute" (record, p. 78). Therefore it was held that no recovery could be had unless there was fraud, or error so gross as to constitute fraud in fixing an angle of 1 on 1.

Where the contract required that the engineer officers fix the limits of excavation at angles of repose to be ascertained by them and where they fixed and maintained, during the progress of the work, an angle of 1 on 1 at which the banks of the excavation did not stand, and

could not stand, under the conditions and during the time of the work; and when those officers afterwards continually maintained that angle, although they believed there was no angle, at which the banks would stand, and when the record shows that nature ultimately found and established the angles of repose, then there was error in fixing that angle so gross as to constitute fraud in law.

There are but two alternatives. Either, at the making of the contract, there was an angle of repose to be ascertained by the officers of the Government as provided in the contract, or contrary to the representation and agreement of the contract, there was no ascertainable angle of repose. On the first hypothesis the engineer officers were obligated by the contract to fix that angle at which the banks would stand under the actual local working conditions; and the contractors were entitled to excavate the material to that angle from the natural bank. But those officers, instead of adopting that angle, arbitrarily staked the angle of 1 on 1 and thereafter compelled the removal of the sloughed mud while paying only the unit prices of excavation from natural banks. On the second hypothesis the Government, in the contract, represented that there were angles of repose, and agreed that its officers would fix angles of excavation from the banks at which the banks would stand under the local working conditions when, in fact, there was no such angle; and those officers nevertheless fixed an arbitrary angle of excavation of 1 on 1, knowing that the banks did not, and would not, stand at that angle. The contractors thus were compelled, at the unit prices, to remove mud from the lock pits instead of excavating earth from the natural banks. Under either hypothesis the Government failed to perform its contract agreement when it arbitrarily fixed the angle of 1 on 1 at which the banks did not stand.

It seems hardly denied in the opinion of the Court of Claims that the definition given by the engineers to the term "angles of repose" used in this specification is in conflict with the definition of that term in all dictionaries (p. 77).

Had the engineer officer the power to place upon this term, by the arbitrary choice of an arbitrary angle, a meaning which its generally accepted sense will not bear, and thus to throw upon the contractors new obligations not within the contemplation of the parties? We submit that he had not.

The language of the specification gives him no such power. Powers conferred by contract upon an engineer are strictly construed and nothing is added by intendment.

In *Fontano* v. *Robbins*, 22 App. D. C. 253, 265, where power was conferred upon the architect in terms very similar to those conferred upon the engineer in this case (Article 2, foot p. 255) the court said (p. 264):

"The learned justice below seems to have been of opinion that the architect had paramount authority over the contract and the work to be done under it, and that he could change and vary the contract and the plans and specifications of the work as he thought proper; and this appears to have been the opinion of the architect also, as to the extent of his powers."

Upon this the court remarks (p. 265):

"Upon such a construction of the contract it would afford the plaintiff, the contractor, little or no protection, and all power would reside in the architect to change and modify the terms of the contract at his will and pleasure. If he can dispense with one provision of the contract, made manifestly for the protection of the contractor, he could dispense with any other material provision, or as many others as he might think proper, and the rights secured by contract would thus become subordinate to the

will and pleasure of the architect. This was clearly never contemplated by the contracting parties. Indeed the very terms of the contract forbid it."

And again (pp. 266, 267):

"But, apart from an agreement to that effect, an architect is not the general agent of the owner, and has no power to change plans of the work, and especially not to the detriment of the contractor. He can not change the terms of the contract, and either omit or insert provisions that the parties have not agreed to, unless expressly authorized by the parties. The terms of the contract, that the contractor, under the direction and to the satisfaction of the architects, will provide all the materials and perform all the work mentioned in the specifications and drawings, made by the architects, and made parts of the contract, only mean such supervision and direction, looking to the execution and completion of the work according to plans and specifications, as may be proper to be given to effect that end. Such provision makes it the duty of the architect to see that the contract is complied with, not violated."

So too, in *Central Trust Company* v. *Louisville Railway Company*, 70 Fed. Rep. 282, the court said of a provision for a final estimate to be made by the engineer upon which payment was to be made (p. 285):

"I do not see that this is an agreement that this estimate of the engineer is to be conclusive. The court should not imply such an agreement, but should require clear and express language, because it is contracting away the right of the party to appeal to the courts of justice in case of a controversy."

Both these cases are referred to with approval by this court in *Mercantile Trust Company* v. *Hensey*, 205 U. S. 298, 308, 309.

This case is one in which the engineer's action was not a construction of doubtful language of specifications,

but a departure from their plain meaning. It can only be sustained by holding that the engineer can under the guise of construction alter materially the clearly defined obligation of the contractor to the contractor's detriment.

As said by Chief Justice Nott in *Utah Stage Company* v. *United States*, 39 C. Cls. 420, 439:

"To hold otherwise would be to hold that this carefully prepared contract, with the elaborate specifications thereto annexed, might be reduced to three lines: The undersigned, in consideration of $————, covenants and agrees that during the next four years he will do whatever the Post-Office Department bids him."

And this view was affirmed by this court, 199 U. S. 414.

SLOPE ADOPTED NOT AN "ANGLE OF REPOSE."

Moreover, even as defined by these officers, the slope actually adopted for the banks was not an "angle of repose." It was "an angle at which the banks would stand for the time necessary to complete the work when not submerged from rises in the river or when in a dry condition" (top p. 55). Such conditions, however, did not exist. "During every working season at least one rise in the river occurs which affects the stability of the slope and causes it to slough, and during every year there are liable to be more frequent rises" (near foot p. 54).

Colonel Rossell in his annual report for 1901 says:

"During the winter considerable earth was washed by floods from the exposed slopes back of lock sites 4, 5, and 6, and partially filled the lock pits. After operations were resumed—in May—the work was again held back by rains and rises for about a month. Since June 15, the weather and river stages have been favorable, and good progress is now being made" (Report, Chief of Engineers, U. S. Army, 1901, p. 1826).

He could hardly have more forcibly stated the violation by the Government of its obligation to cause these banks to be sloped to "the ascertained angles of repose."

"Angles of Repose" in Engineering.

The manner of treating slides on the Panama Canal where the Government is itself doing the work as well as the meaning of the term, "angles of repose," is shown in the report of Lieutenant-Colonel D. D. Gaillard, Corps of Engineers, U. S. Army, Division Engineer of the Central Division, forming a part of the published Annual Report of the Isthmian Canal Commission for the year ending June 30, 1913. He says (pp. 153, 154):

"The only method of treatment for slides which has proven effective once they have developed, is to excavate and haul away the moving material, until the slide comes to rest at the angle of repose for the particular material then moving. This angle of repose varies greatly in different parts of the Cut, depending not only on the character of the material involved in the slide, but also upon the inclination of the strata and the angle at which the formation crosses the canal.

"At the southern part of Cucaracha slide the angle of repose equals one vertical on two horizontal, while on the west bank of the Cut, near the town of Culebra, the argillaceous sandstone is still moving slightly on a slope a little steeper than one vertical to five horizontal."

At a recent meeting of the American Railway Engineering Association, composed of the leading railroad engineers of the United States, the question of slides was elaborately treated and one rule adopted was:

"The flattening of the slope is the most economical and permanent method of curing a slide embankment" (Railroad Age Gazette, March 19, 1909, pp. 625, 626).

The following sentences from a recent article in the *Engineering Record* for May 16, 1914, entitled, "Hand-

ling Canal Bank Slides in Chicago," show both the meaning of the term "angle of repose" and the impropriety of permitting this material to slide into the canal pit and requiring it to be excavated therefrom rather than to permit the contractor to excavate it from its natural situation in the bank.

"The remedial measures which have been adopted by the Sanitary District for the first two classes of slides have been practically those which have been used by the United States engineers at Culebra. The position which the Sanitary District engineers have always taken in dealing with this type of slides is this: Where slides occur due to the failure of an underlying stratum of material to hold up the unbalanced pressure automatically applied by the cutting of the channel, or where the bank created by the same operation shows movement upon an underlying stratum of a different material, the only remedy which can be advised is the flattening of the slopes until sufficient weight has been removed to establish a state of equilibrium; in other words, until the angle of repose for the material then moving has been attained. For this reason it has been maintained that waste or spoil banks should be placed at a considerable distance from the banks in all cases where preliminary borings show indications of formations of this character and the side slopes of the channel designed flat enough to prevent movement of the bank. The distance that the spoil bank should be placed from the channel and the angle of inclination of the side slopes are subjects of conjecture, and may be arrived at with any degree of accuracy only by one having long experience with similar work, and with the particular class of material to be encountered. It is far from an exact computation. However, it may be generally said that the angle of inclination of a slope to prevent movement is in most cases steeper than the angle necessary to retard and stop the movement of a bank which has commenced to slide. For this reason it can readily be seen that it is far more economical to excavate the side slopes to the necessary inclination as the excavation is carried down to grade than it is to allow the mate-

rial to slide and excavate it afterwards. Not only does the latter method tend to increase the total yardage in any cross-section, but it also involves other difficulties, such as extricating machinery, track, etc., with the accompanying loss and expense, and at completion finds a canal with an irregular, ragged appearing bank, which invites the rain and weather to commence a process of gradual erosion, and washing down of the surface." (Engineering Record, Vol. 69, pp. 562, 563).

These quotations show the meaning of the term "angle of repose," and illustrate the folly of adopting an arbitrary angle of 1 on 1.

The statement attributed to the Engineer Officer (first paragraph of Finding V, record, p. 54) that "an angle of 1 on 1, or 45 degrees from horizontal" "was the angle in general use on the Mississippi River for the slopes of temporary excavation," is without relevancy to work in an entirely different locality. The banks of the Mississippi vary greatly in stability in different parts of its course (Thomas & Watt, Improvement of Rivers, 2d ed. (1913), pt. 1, p. 86). "Experience on this river both in bank revetment and levee construction has shown that, in general, if the upper bank be cut back to a slope of 1 vertical to about 3 horizonal, it will be stable even when saturated, though in special cases the soil may be such as to require a more gentle slope" (*id.* p. 199).

High Water Not Abnormal.

Gleeson v. *Virginia Midland R. R.*, 140 U. S. 435, was an action for damages for an accident to a train by a landslide produced by the giving away of the banks of a cut, which was at so steep an angle as to slide through the action of rain. The court said (p. 440):

"The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is)

in the erection of the fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause land slides and consequent dangerous obstructions to the track itself, from ill-constructed railway cuts. To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the *débris* created by the common processes of nature, is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it."

In *Pickley* v. *United States*, 46 C. Cls. 77, 89, the Court of Claims refused to treat the occurrence of high water on the Mississippi River as abnormal, saying (p. 89):

"It is a matter of common knowledge that on that river and on all rivers extending through a large extent of territory, periods of high water occur as regularly as the seasons."

This court in *United States* v. *Garbish*, 222 U. S. 257, refused to treat levee work on the Mississippi River as emergency work, as the river is liable to be bank full any day in the year.

The Warrior River, on which the work under this contract was to be performed, is noted for high rises. Brigadier-General Henry L. Abbot, U. S. Army, Retired, late Colonel, Corps of Engineers, in his work, "Problems of the Panama Canal," p. 169, thus compares this Warrior River with the famous Chagres:

"The old popular belief that the regulation of the floods of the Chagres presents unprecedented difficulties, although often asserted, is erroneous. Thus the works

of improvement now in progress upon the Warrior and its tributary, the Black Warrior, of Alabama, offer conditions far less favorable. At Tuscaloosa an extreme oscillation of 67 feet is of record, with a rise of 20 feet in 4 hours. The discharges range from 150 to 150,000 cubic feet per second. Such extremes have never been approached by the Chagres."

REASONS FOR NOT SLOPING INSUFFICIENT.

The opinion of the court, summarizing and commenting upon the finding says (p. 77):

"Had the banks been sloped to a flatter angle the sloughing would have been reduced, but the finding does not show to what extent. To attempt to do so would be a matter of conjecture, as the floods caused deposits from above of silt, sand, and sediment around the locks, and brought leaves, trash, and earth from the lands and fields adjacent to the lock sites and into the river.

"The slopes of the excavation were not better flattened by the engineer officers, because in their judgment there was no practical angle at which the banks could have been sloped which would have caused them to remain stable under the conditions to which they were liable to be subjected. The finding shows that nothing could have prevented the banks from caving, as the floods subsided and water (from rises in the river) receded.

"There was no angle of slope which could have been adopted by which the banks would remain stable when subjected to such rises in the river as were liable to happen in times of flood. If the slope for the temporary work had been flattened to 1 on 3 the quantity of excavation would have been increased beyond the quantity estimated in the specifications."

We think the last sentence involves some misapprehension. The quantity excavated would have been nearly, if not quite, the same, whether it had been taken out of the natural bank or allowed to slough into the lock pits. If the writer above quoted from the *Engineering Record* (*ante*, pp. 38, 39) is correct, it would probably have been

less if the bank had been sloped before the material began to slide.

The main difference would have been, not in the quantity of the material excavated, but in the place from which the contractors would have had to remove it. The banks found their angle of repose in the end. Nature established that. Our complaint is that the contractors were compelled to do their excavating from the lock pits after nature had thrown the sloughed material down into them, instead of being permitted to make the excavation from the natural banks in the first place.

The Cross-Section Sheets.

It is said, however (Finding V, p. 54, Opinion, p. 78), that the contractors might have known by an examination of certain sheets styled in the findings "original cross-section sheets" at what angle the banks were to be sloped, because those sheets were on file in the Tuscaloosa office, and although not made a part of the letting plans, were open to the examination of bidders prior to submission of proposals.

The position taken by the court below on this point is singularly at variance with that taken on the question of borings, which we have just been discussing. The boring sheets, although referred to in the specifications forming part of the contract and physically annexed to and forming a part of the contract itself, are disregarded and no effect given thereto.

These "cross-section sheets" are nowhere referred to in the specifications or contract. It is not claimed that they were brought to the attention of the claimants before making their bid. The statements would not have been binding on the claimants as any part of the contract if they had seen them; yet the opinion of the Court of Claims treats them as binding upon the claimants.

The expression in the finding (p. 54), "open to examination of bidders" is somewhat ambiguous. As there was nothing in the advertisement to suggest the existence of any such papers, and as it is not claimed that any of the claimants ever saw them before making their bid, they were not even put upon inquiry as to the existence of such sheets. The fact that the notations showing the angles of slope were in pencil serves to show their informal and unauthoritative character.

Even if they had come to the notice of the claimants they would have been warranted in disregarding them as in conflict with the plain language of the specifications. These did not require the bank to be sloped to some fixed angle, as of 1 on 1, but to "ascertained angles of repose" with the "limits" and "amounts" of excavation to be "greater or less" according to "local conditions." The very fact that the term "angles" was in the plural and that it was stated that "The limits of the excavation and quantities to be excavated will depend upon" such angles, shows that no certain angle such as 1 on 1 was premeditated; but that the angles might vary upon different parts of the work as might be ascertained to be necessary to place the banks in repose.

It has often been held that the fact that a paper is on file in a particular office does not constitute notice to the public in the absence of some recording statute providing that it shall operate as such or in the absence of actual knowledge of the parties whose rights are claimed to be affected by the notice.

In *Beckwith* v. *City of New York*, 148 N. Y. App. Div. 658, 133 N. Y. Supp. 202, the court said:

"So long as a prospective bidder applies at the office to which he was directed to apply for an inspection of the plan, and is there shown a plan which, read in connection with the specifications, sufficiently describes the

work to be done, and is given no hint or suggestion that there are other more detailed plans in existence, he is in our opinion justified in submitting a bid based upon the specifications which he has received and the plan which he has been shown."

In *Callahan Construction Company* v. *United States*, 47 C. Cls. 177, it was the contractor who claimed the benefit of a paper which was shown him by the engineer of the Government, named in the advertisement as the one from whom information was to be obtained. The paper shown the contractor was entitled "Available Quantities of Material for Embankment." It was held that as the paper in question was nowhere mentioned in the specifications or any other part of the contract, the contractor was not entitled to avail himself of any statement or representation therein made.

The court said (p. 181):

"If the representations contained in the paper above referred to had been made a part of the written contract, and had not been modified by any other provision contained therein, there might be room for the application of the rule of law above referred to, a question, however, which it is unnecessary to decide in this case. The paper containing the statement of 'Available quantities of material for embankment' was given to the plaintiff as information to form a basis upon which to make its bid, and after this was done the contract was entered into with specifications attached which were made a part of the same. This is the contract we are authorized to construe and no other."

The application of the same principle to the present case deprives any argument based upon these cross-section sheets of all force. They constituted no part of the contract. They were never brought to the attention of the claimants before bidding or entering into their contract, or so far as appears until they were offered in evidence in

this litigation. They are, therefore, wholly without force as controlling the positive terms of the written contract.

SHEATHING.

The specifications provide (pp. 28, 29):

"51. *Sheathing.*—Curbing of rough planks and scantlings or poles, shall be used to reduce excavation as directed by the Engineer Officer, and shall be paid for as 'sheathing,' poles being estimated by standard log measure. It shall be left in the excavation or taken out at the option of the Engineer Officer, and when used again shall be paid for at half price."

The court found (p. 55):

"In July, 1900, prior to a time when any sloughing had occurred, claimants in a letter to the resident engineer suggested the use of sheathing to protect the slopes. On March 24, 1902, when the work on excavation of the bank walls had been completed, claimants wrote to the engineer officer complaining that the Government had not adopted sheathing for the protection of the slopes, as provided in paragraph 51 of the specifications. This use of sheathing under paragraph 51 of the specifications for the protection of the slopes was not permitted by the engineer officer for the reason that the sheathing provided for in said paragraph was not intended to protect the slopes but to reduce excavation."

The paragraph in question is to be read in connection with the provision of Par. 48 (record, p. 28): "The limits of the excavation and quantities to be excavated will depend upon the ascertained angles of repose."

The banks were to be sloped to an angle at which they would remain in repose. With a view, however, of avoiding an excessive amount of excavation, the same object, bringing the banks to a state of repose, might be attained by the use of sheathing. The engineer officer, however, refused to adopt either method pointed out by

the specifications. He would neither permit the banks to be excavated by the contractors until they reached a state of repose, nor permit the amount of excavation to be reduced by the use of sheathing. Instead, he allowed the banks to remain in a state which was in no sense one of repose. When they sloughed and fell into the lock pits, as they might have been expected to do, the contractors had to excavate the material from the places from where it had fallen into the pits. Clearly this was in no sense in accordance with the provisions of the contract.

PROTEST, DEMAND OF ADDITIONAL COMPENSATION, ETC.

It is found (record, p. 55): "It does not appear that any *written* protest or objection was made," etc. There were, however, "verbal protests and complaints" (record, p. 55). There was no requirement for *written* protest or objection. The duty was to allow and indeed to require the banks to be sloped to angles of repose. It is also found that "no appeal was taken," etc. As was said in *Ripley* v. *United States*, 223 U. S. 695, 702:

"But there was no requirement or provision for appeal in the contract."

It is also found (near foot p. 58) that the contractors did not request or demand additional compensation for the removal of the material sloughed or caved in from the banks. For them to have made any such request would have been futile. A prior demand for the payment of unliquidated damages for breach of a contract is not a prerequisite to suit for the breach. The written contract fixed certain prices for excavation. These prices they received. The officers of the Government had no authority to pay any other prices than those fixed by the

written contract. The claim of the contractors is for unliquidated damages, for violation of the written contract providing that the limits of the excavation shall depend upon the ascertained angles of repose. As such it was not within the jurisdiction of the executive officers of the Government. The Court of Claims has exclusive jurisdiction of it. The subject was reviewed by this court in *Cramp Co.* v. *United States*, 216 U. S. 494, where it was said (p. 500):

"It is well understood that executive officers are not authorized to entertain and settle claims for unliquidated damages."

SMALL ITEM CONCLUDING FINDING.

The small item of $1,183.41, at the conclusion of this finding (record, p. 56) is for excavating some of this material which sloughed down and buried certain timber frames erected and used by the claimants as forms for their concrete. These forms are required by Par. 65 of the specifications (record, p. 32), and are essential for properly placing the concrete work. The court has found that the reasonable value of this excavation is the contract price for excavation at each of the two locks at which this trouble occurred plus $1 per cubic yard, the additional cost of excavating owing to the material having fallen from its natural place into a location where it was more difficult and expensive to excavate.

The claimants claimed to be paid by the engineer officer for this excavation. The reason they made this claim when they made no claim on the other and larger item is that the engineer officer could and should have paid them the contract price for this excavation, though he had no power to pay them the additional cost consequent on the requirement that they excavate the material in a slimy condition from the bottom of the lock pits.

Not even the contract price, however, has been paid for this excavation. The whole amount is clearly allowable for the reasons stated on the first and larger item of this finding.

3. Order for Additional Cofferdams.

THE FACTS SUMMARIZED.

This item depends upon the provisions of Paragraph 45 of the specifications (p. 27):

"45. *Cofferdams.*—All pumping, bailing, and temporary works needed to protect the permanent work from water, during the construction, shall be done by the contractor at his own expense, the cost of same to be included in his prices for concrete, timber, etc. It is probable that the sheet piling entering into permanent construction can with proper banking and shoring, be made to serve the purpose of cofferdams, but the contractor must rely upon his own judgment in regard to this. Should additional cofferdams be needed they shall be built on plans approved by the Engineer Officer, and, where liable to interfere directly or indirectly with navigation, shall be removed when no longer needed, the building, maintaining, and removal of same to be without cost to the United States."

Also upon Paragraph 88 (record, p. 38):

"88. *Purchases Made or Work Done, Not Specified.*—If at any time it should become necessary, in the opinion of the Engineer Officer in charge to do any work or to make any purchases not herein specified, for the proper completion of this contract, the contractor will be required to furnish the same at the current rates existing at the time of said purchases or work. The current rates to be determined by the Engineer Officer in charge."

The engineer officer through the resident engineer November 17, 1900, directed claimants to build cofferdams at all three of the locks in accordance with plans furnished them, and informed them that they would be

paid for the same at their contract price for sheet piles, and $3 per thousand feet board measure for such parts of these cofferdams as they might be required to remove when no longer needed. This order was accepted by claimants in writing November 18, 1900, and they thereupon ordered the materials for the same. Three days after the receipt of said order to build the cofferdams and before the work of construction thereunder had commenced the Warrior River rose to and remained at such a height that it was not possible to build the cofferdams during the winter (Finding VII, p. 59).

The cofferdams were afterwards constructed by the claimants to the heights necessary to protect the work against floods (record, top p. 60).

A Valid Order for Extra Work.

The order of the engineer officer with his promise to pay for the material and work at certain rates was clearly a valid order under the terms of Paragraph 88 of the specifications, unless it is controlled by the terms of Paragraph 45, entitled, "Cofferdams" (both quoted, *ante*, p. 48).

Paragraph 45 represents that it is probable that the sheet piling entering into the permanent construction can be made to serve the purpose of cofferdams; "but the contractor must rely upon his own judgment in regard to this."

The contractors were *not* allowed to rely upon their own judgment. Without any suggestion on their part, the engineer officer ordered them to build cofferdams and promised to pay them a certain rate, and the material was immediately ordered. The mere fact that the water only three days after the order was given rose to such a height as to prevent immediate construction of the cofferdams taken in connection with the fact that the lumber had already been ordered only attests the diligence of the contractors in complying with the order of the engineer.

The court below relied upon the recent decision of this court in *United States* v. *Plumley*, 226 U. S. 545, in which it was held, to quote the syllabus:

"Where a contract for Government work provides that in every instance changes must be made by a prescribed method and approved by the Secretary, the contractor can not recover for extras not ordered in the manner prescribed; and this rule holds even in a hard case where, as in this instance, the work was extra and of value."

The converse of this proposition must be equally true, that where extras *are* ordered in the manner prescribed by the contract the decision of the officer authorized by the contract to give the order and fix the value of the materials and work is conclusive that they are extras and are to be paid for at the rates so fixed by such officer in accordance with the contract. As to extras, the contract at bar provided the method through the action of "the Engineer Officer in charge" alone.

This finding shows:

1. That notwithstanding the representation of the specifications that no cofferdams would probably be necessary, but that the contractors must rely upon their own judgment with regard thereto, (Par. 45) the engineer officer (under Par. 88) directed the claimants to build cofferdams at all three locks in accordance with plans furnished by him.

2. That recognizing that this direction involved extra work outside of the contract, he, in accordance with Paragraph 88 (record, p. 38), promised to pay for the work at rates fixed by him.

3. That the claimants accepted the order and procured the materials for the same on the faith thereof.

4. That subsequently thereto, and without any revoca-

tion of the order, the War Department decided that the claimants could not be paid for the work, which, however, they had actually completed at a cost of $11,456.91.

It should require strong argument to show that work which was contemporaneously recognized by the engineer officer of the Government to be extra and outside of the contract and was formally ordered by him, and performed by the contractor as such, was not in fact extra work.

In *Richards* v. *May*, 10 Queen's Bench Division, 400, the syllabus is:

"Where a contract for the erection of certain works provided that all extras or additions, payments for which the contractor should become entitled to under the said contract, should be paid for at the price fixed by the surveyor appointed by the contractor's employer: *Held:* That the provision impliedly gave power to the surveyor to determine what were extras under the contract, and consequently that his certificate awarding a certain amount to be due for extras was conclusive."

In *Peterson* v. *New York*, 205 N. Y. 329, the court said:

"But in this case it is shown that the engineer had exercised his discretion in the matter and had given the plaintiff orders to procure the material for the lining of the tunnel as well. And if it really should appear that the plaintiff had acted upon such direction and had really made a contract by which he was bound to take the iron for the lining of the tunnel as well as the shaft, we see no reason why he should not be awarded damages therefor."

In *Johnson* v. *Albany*, 86 N. Y. App. Div. 567, 573, the court said:

"This was increased work made necessary by an alteration directed by the order of the engineer in writing, and within the explicit terms of the contract the contractor was entitled to extra compensation therefor."

It would be contrary to good faith to permit an engineer to order certain things as extras and promise to pay a specific price for the same, and then after the order had been acted upon by the contractor to permit the Government to contest the validity of the order on the ground that the items ordered were not extras.

This item should therefore be allowed.

Conclusion.

It is therefore submitted that the judgment should be reversed and the case remanded to the Court of Claims for further proceedings.

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Supreme Court, U.
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Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 204.

GEORGE B. CHRISTIE, JESSE LOWE and JAMES O. HEYWORTH, Surviving Partners of the firm of Christie, Lowe and Heyworth, Appellants,

v.

THE UNITED STATES.

Appeal from the Court of Claims.

REPLY BRIEF FOR APPELLANTS.

DUANE E. FOX,
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October Term, 1914.

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REPLY BRIEF FOR APPELLANTS.

General.

While it is evident that the arguments of counsel for the United States are anticipated by appellants' brief heretofore filed, it would seem that the questions at issue can be more clearly defined by a few specific comments.

Counsel for the Government claims (appellee's brief, page 5) that the contractors can not recover damages for increased cost of work due to obstructions and impenetrable material which the Government found in its borings and concealed in its boring sheets, thereafter made a part of the contract, because the contractors "made investigations"; whereas the court below on the same item held that the contractors could not recover because "they made *no* inquiry or independent investigation as to the probable existence of imbedded logs or

drift in the material to be excavated, nor did they inquire or attempt to ascertain by what method said borings had been made or the time expended in making them " (Record, p. 53).

And at the same time that counsel for the Government is asserting that an investigation *was made* by the contractors, he further argues (appellee's brief, pp. 28, 29) that the contractors should not be allowed to rely upon the Government's representations by its false boring sheets because they had ample opportunity to inform themselves of the material to be excavated by making their own borings *and did not do so;* whereas the dates disclosed by the record (see particularly the dissenting opinion below, Record, pp. 89–90) gave only 31 days from the date of advertisement to the date of receiving proposals, within which time the contractors had to travel from their offices in Chicago to Alabama and return and prepare and file their bids; and the court finds (IV, p. 51) that the United States boring party had been occupied four months, lacking four days, in making the borings which were afterwards falsified on the sheets. Upon which of its inconsistent defenses does the United States rely?

In the same connection, counsel for the Government argues (appellee's brief, p. 9) that the contractors, by the nature of the country and by public records and by references to stumps and logs in the contract, had "actual notice" of buried logs and stumps and "did expect to encounter some logs" and therefore they were not deceived by the false boring sheets in December, 1899; whereas (appellee's brief, pp. 17, 21) he argues that the Government boring party in July–November, 1899, when the drill struck impenetrable obstacles or material (and was moved to a penetrable place and the boring sheets subsequently falsified in that connection) had no knowl-

edge or notice that this indicated logs; that they could simply speculate whether the obstruction met by the drill was a log or other impenetrable material. That is, general conditions were "actual" notice of logs to the contractors but were not even constructive notice to the agents of the Government when supplemented by four months' drilling.

Again, counsel for the Government having argued as above that the boring sheets, though expressly referred to in and made a part of the contract, should not, and could not, have been relied upon by the contractors, argues under another item (appellee's brief, p. 43) that certain pencil cross-section sheets in the resident engineer's office showed that the Government contemplated sloping the banks of excavation at 1 on 1 and that these pencil drawings, forming no part of the contract, were binding on the contractors and overruled the specific provision of the contract to the effect that excavations would be made at the "ascertained angles of repose." In other words, boring sheets referred to in a contract formed no part thereof, but penciled cross-section sheets, not referred to in the contract, are a conclusively binding part thereof.

So, also, as to the Government's action in fixing the arbitrary angle of 1 on 1, counsel argues (appellee's brief, pp. 37–40) that the specification of the contract giving the engineer officer the authority to fix the lines, slopes and grades of excavation should be strictly construed for the benefit of the United States as giving that officer complete discretion; whereas the provision of the same specification that excavation would be made from the banks to the "ascertained" angles of repose is meaningless. In other words, there was no mutuality between these entirely consistent provisions of the contract and the engineer officer had discretion to make them inconsistent and to modify the contract at will.

Similarly inconsistent is appellee's argument that the decision or discretion of the engineer officer in charge was final and conclusive in fixing an arbitrary angle of 1 on 1 instead of "angles of repose" (appellee's brief, pp. 37–9), *but* that the decision of that officer was not final and conclusive (appellee's brief, pp. 48–51) when, under the specifications, he determined that the construction of cofferdams was extra work and agreed to pay for it.

Likewise, appellee argues that the failure of the contractors to appeal from the decision of that officer with reference to the angle of 1 on 1, or to make a claim for extra compensation, is conclusive against them to prevent recovery (appellee's brief, pp. 42–3,), *and*, on the other hand, their action in making a claim and contract for extra work in building cofferdams is conclusive against them to prevent recovery (appellee's brief, pp. 48–51).

Indeed, counsel for the Government is unable to state his facts with reference to the question of angle of repose without contradictions. He says:

"Moreover, appellants made no protests * * * to the engineer officer who was chargeable" (appellee's brief, p. 42), and

"Under such conditions they can not now be heard to complain, for * * *, the engineer officer did not have an opportunity to determine whether or not he would insist on the work proceeding as he had indicated, or refer the matter to his superior" (appellee's brief, p. 43).

Whereas counsel for the United States also says:

"It is true that they made verbal protests and complaints to the local engineer in regard to the adoption of flatter slopes, but they failed to make any *written* protest while the work was going on * * *" (appellee's brief, pp. 42–3), and

"Counsel for appellants * * * complained that the *engineer officer* refused to permit them to use sheathing * * * for the protection of the slopes" (appellee's brief, pp. 43–4),

and the request, were *in letters* to both the resident engineer and to the engineer officer (Finding V, Record, p. 55).

II. Erroneous and Deceptive Borings.

Appellee divides its argument (pp. 4–36) on this item into four contentions supplemented by a reference to the dissenting opinion below. Taking these in their order:

1. Appellee argues that appellants had actual or presumptive knowledge of the conditions which was sufficient notice of buried logs without indicating anything further on the drawings and excluded charges of erroneous and deceptive representations by borings.

The United States here attempts to confine the deception of the boring sheets and the resulting damage to the contractors to the matter of buried logs. There is nothing in the case to warrant this attempt to narrow the facts or issues of law.

Appellee makes no attempt to meet or whittle away the findings of the court below (1) that the boring party of the United States, throughout its investigation, encountered beneath the ground at numerous stations material which could not be penetrated; and (2) that the drill in such instances was moved from the station to some point where penetration could be made to the desired depth; and (3) that the penetration so obtained at a different point was thereafter charted on the boring sheets as having been obtained at the station where the drill had not penetrated; and (4) the sheets so falsified were referred to and made a part of the contract and con-

cealed those facts. (See appellants' brief, pp. 4–5, and citations to the record.)

Manifestly, there was a much broader representation and misrepresentation than the mere matter of buried logs. The falsification of the sheets exhibited to bidders with the contract, when compared with the original records of the boring party, constituted a four-fold concealment and misrepresentation (set out in appellant's brief, pp. 9–10), as to the true history of the bores, the real stations of borings and the nature of the material to be excavated or penetrated by piles "not described or named" on the sheets exhibited to the contractors. (Finding IV, p. 52, first and second paragraphs thereon; p. 53, second and third paragraphs thereon; Finding VI, Record, p. 56, third paragraph of the Finding, numbered "(5)"; p. 57, last two paragraphs thereon; Finding VII, second paragraph thereof, Record p. 58.)

Therefore appellee's argument on the detail of buried logs (appellee's brief, pp. 5–9) is at best only a partial answer.

And it is insufficient as a defense when appellee attempts to apply the argument with citation of cases on pages 9–13 of its brief. It is asked if the contractors would have raised their bid had the boring sheets shown that six borings gave probable indications of logs. Answering speculation with reason we say that the contractors would have raised their bid if the boring sheets had truthfully shown the facts, namely, indications of logs at six stations *and impenetrable material at sixteen stations.* The truthful disclosure of those facts would have disclosed, as was afterwards discovered by the contractors, that the material was far more difficult for excavation and pile driving than the sheets represented.

On pages 9–11, counsel for the United States cites several cases where the purchaser of real estate tried to

set aside the deeds, or recover the purchase price, for alleged misrepresentations by the sellers as to title or quantity of the land and the courts held that both title and the quantity could have been investigated, and should have been investigated, by the purchaser. There are, no doubt, thousands of cases announcing the same principle with reference to the purchase of lands and chattels. Such cases are not even analogous to the case at bar on the facts or law. For example:

First. Assuming that a representation of title or quantity was made by the sellers in the cases cited, let us assume that in each case the seller had exhibited to the buyer an opinion on title or a survey showing lines and quantity and had said this was the opinion of his lawyer or the survey by his surveyor *and the purchaser had subsequently discovered that a part of the lawyer's opinion had been eliminated or the plat of survey had been "doctored"* to increase the acreage over that actually found by the surveyor. Can any one doubt that the courts would have set aside the deed for misrepresentation of fact?

Second. In the purchase of land there is no fixed time within which a purchaser must contract to buy or consummate the sale. He can take as long as he pleases to investigate. At bar only 31 days were allowed between the advertisement and the last day for bidding. A bidder, with offices in Chicago, was under no obligation to doubt the truth of, or to investigate, sheets which represented borings which it had taken practically four months to make.

As to impenetrable material, other than logs, the appellee argues (pp. 11–12 of its brief) that it was found by the court below that the drawings did show various kinds of material indicating both easy and hard driving.

The argument has the same weakness as the false boring sheets. That is, the sheets showed certain materials,

of certain descriptions, and represented, whatever the description, that the materials were *penetrable to the depth to which the piles would have to be driven and that such penetrable material had been found at the indicated stations;* which was contrary to what, actually, had been found by the boring party. True, as appellee says (p. 12 of its brief), the court below found that no agent of the Government had any knowledge of the existence of "conglomerate." *But they did find impenetrable material and concealed it on the sheets and the contractors afterwards found it was "conglomerate." The concealment of the existence* of impenetrable material, not the *name* of it, is the vital fact. The case of *Nesbit* v. *Railroad Company*, 2 Spears, 697 (cited by appellee, pp. 12–13 of the brief), is not in point, or even analogous. *There was no representation whatever in that case that the material was of any character.*

We are safe in asserting that the decision would have been different if the railroad company, in that case, had falsely represented, by the words of the contract or by boring sheets, that only earth had been found, whereas the boring party had encountered rock. Such was the ruling in:

Cases quoted in appellants' brief, p. 16 *et seq.* and 21 *et seq.*

Appellee's inconsistent assertion (pp. 13–14 of its brief) that general conditions imputed, to the contractors, actual knowledge, but, to the agents of the Government, no knowledge of logs, has been considered *supra.*

The Government's argument is off the issue because it ignores the settled principle that a contractor is under no obligation to doubt or investigate the truth of representations made in or attached to the contract as the basis of bids. See the following cases in appellants' brief, pages 10–22, 26–27:

Hollerbach v. *United States*, 233 U. S. 165;

Pearson v. *Dublin Corporation*, 1907 Appeal Cases, 351;
Boyd and Forrest v. *Glasgow, etc., Rwy.*, 1914, 1 Scots Law Times Reports, 176;
Hingston v. *Smith Co.* 114 Fed. 294;
Eaton v. *Winnie*, 20 Mich. 156;
Reynell v. *Sprye*, 1 De Gex, M. & G. 660;
Old Colony Trust Co. v. *Dubuque, etc. Co.* 89 Fed. 794.

2. Appellee argues (pp. 14–15 of its brief) that the findings below contradict the statement in appellants' brief that a number of buried logs were discovered in the course of the borings.

It is sufficient to say that there was not the slightest doubt in the mind of the court below that the boring party did encounter logs and abandon the boring and conceal and falsify this on the sheets. Appellee's argument is based on the language of disjointed quotations from the record and we are willing to leave this point on what the court below said, pages 52–3 and 57–8, and the dissenting opinion, page 87. See, also, appellee's brief (p. 15) quoting the finding that "The buried logs, found beneath the surface as aforesaid, were not described or named in the drawings."

3. Appellee argues (pp. 15–20 of its brief) that the claimants can not recover for the falsification of the boring sheets, because the borings were not originally made in 1899 for the information of bidders and because the motives for falsifying the sheets were innocent.

Appellee's argument seems to be stated on page 16 to the effect that the borings were originally made to show the location of bed rock, and it was therefore "superfluous" to indicate on the boring sheets that the drill had been shifted to obtain penetration or that impenetrable mate-

rial had been encountered. No principle of law is cited in support of this novel proposition.

We are content to leave this to our argument (appellants' brief, pp. 8, 22–27). That the falsification of boring sheets is contrary to engineering practice and constitutes a breach of contract, *however innocent the motive*, is settled by:

The cases last cited, *supra*, and

Finding IV, Record, p. 53, second paragraph thereon.

Appellee falls into inconsistencies here, as elsewhere. Referring to the testimony that the resident engineer knowingly, though without fraudulent purpose, falsified the boring sheets, it says (p. 19 of its brief) that reliance upon testimony of such "doubtful" nature as that of the resident engineer's instructions to falsify the boring sheets, "reveals the desperateness of appellants' claim" and then proceeds to rely upon that testimony as showing the engineer's innocence of a fraudulent motive to relieve the United States of liability. Does this indicate the "desperateness" of appellee's defense? Manifestly, the testimony was competent and material to show the resident engineer's acts in supervising the boring party.

It is an error to suppose as is implied in appellee's brief, page 18, that the instruction of the resident engineer to the chief of the boring party, found at foot of page 52 of record, was established by the testimony of any of the claimants. The remarks of the judge of the court below who delivered the opinion quoted appellee's brief (pages 18–19) were directed to another item of the claim not involved in this appeal. There was but one possible witness remaining to the instructions given by the resident engineer and that was the chief of the boring party employed by the United States. By his testimony alone could be and was the fact established.

Counsel is in error in stating (appellee's brief, p. 16),

that in making borings in this case or in any case in engineering practice, "the ground was staked out in plots 50 by 68 feet, in each of which spaces there was to be placed one boring" and that the drill was simply "moved a short distance within the same area." The same error appears in the middle of page 16 and foot of page 17 of appellee's brief. The finding is (one-third down page 53 of Record) that borings show truly and fully (among other things) "the definite location of the boring actually made." Also, that in this particular case (p. 51) "the ground was staked out for such borings at distances from 50 to 68 feet apart," etc., and on page 52 of Record that "when such obstructions were met the apparatus was moved elsewhere until a place was found where the drill would penetrate, and the result was recorded *as if taken at the place staked out.*" In other words, the location of a boring is a definite point, not an "area" or a "space designated" or a "block of territory" (appellee's brief, pp. 16–17).

4. Appellee argues (pp. 20–36 of its brief) that the terms of the contract and the findings exclude the idea of a warranty and that the case at bar differs from cases cited in appellants' brief.

So far as this argument repeats the assertion that the contractors were charged with knowledge of the existence of logs (and only logs), whereas the boring party had no such knowledge (brief, pp. 20–21), we need not repeat what has already been said.

In "distinguishing" the case of *Hollerbach* v. *United States*, cited by appellants, the appellee says that (1) in that case there was a positive and material representation as to the material backing the dam and (2) that in the former case the claimant relied upon the statement of the Government.

First. The Government made the boring sheets a part

of the contract at bar and that constituted *in law* a general representation that the drills had found penetrable material at every station without encountering obstructions, either as logs or other impenetrable material, and paragraph 48 of the contract (Record, p. 28) went further and made the specific warranty that the material to be excavated was, so far as known, of the penetrable, readily handled character indicated on the boring sheets; whereas the Government *actually knew* that impenetrable material or buried logs had been encountered at the stations and that the penetrable material had not been found at stations. These were "positive" and "material" misrepresentations of fact "actually" known to the Government.

"The specification stated that 'bores have been put down at various parts of the line, the positions of which are shown on a small scale plan, and a copy of the journal of these bores may be seen at the engineer's office.' As matter of fair construction of these words I think the defenders represented to the pursuers and the pursuers were entitled to believe, that the small scale plan showed the positions of all bores which had been put down on the line; that they could see at the engineer's office the accurate and complete journal of all these bores, as reported by the borers to the company; and that the bores had been made by borers whom the defenders considered to be competent. If these conditions were not complied with I think there was misrepresentation * * * however innocent may have been the motives * * * *."

Boyd and Forrest v. *Glasgow & S. W. Rwy.* 1914, 1 Scots Law Times Reports, 176, 180.

Second. To say that the contractors did not rely upon the boring sheets is mere assertion. The findings of the court below, in their entirety, show conclusively that the boring party found impenetrable material (logs or whatnot) at 11% of the stations and concealed it on the

sheets and the contractors thereafter found the cost of excavation and pile driving greatly increased by that material (logs, conglomerate and what-not) different from that "described or named in said drawings," and "not described or named therein." See:

Finding IV, Record, p. 53, third paragraph thereon.

Finding VI, Record p. 56, second and third paragraphs of the Finding.

Finding VI, Record, pp. 57–8.

Finding VII, Record, p. 58, middle of second paragraph of the Finding.

The Assistant Attorney-General made the very argument in the *Hollerbach* case (see summary thereof, 233 U. S. 166–7) which he now makes to distinguish that case from the case at bar. That argument was held erroneous there. To repeat it here demonstrates the identity of the two cases in principle, not their difference. The facts of reliance by the contractors on the representation were the same there as at bar.

In both cases the contractors relied *in entering into the contract* upon stated representations which were subsequently discovered to be untrue and increased the cost of the work. In such cases it is not necessary to a recovery that contractors should have specifically relied upon, and been damaged by, every detail of each particular misrepresentation. The representations as a whole induce the bids and go to the root of the contract. The resulting damage must be paid by the party who made the representations.

"We think this positive statement of the specifications *must be taken as true and binding upon the Government*, and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations * * *. In its positive assertion of the nature of this much of the work it made a representation upon which

the claimants had a right to rely without an investigation to prove its falsity."

Hollerbach v. *United States*, 233 U. S. 165, 172.

"I consider that the pursuers *entered into this contract* under *essential error* induced by misrepresentation and concealment (though without any fraud) on the part of the defenders in regard to the journal of the bores. * * *

"I have already indicated that in my opinion the completeness and accuracy of the journal of bores did go *to the root of the contract;* * * *

"I think it idle for the defenders to rely on the fact that only a small number, at worst, out of the total number of the bores was incorrect. It is not a question of how many bores were wrong, but of the result to the pursuers' work of such errors as existed. A small number of bores being wrong *might* well dislocate the contractor's scheme of operation over a great part or even the whole of his contract."

Boyd and Forrest v. *Glasgow & S. W. Rwy.* 1914, 1 Scots Law Times Reports, 176, 182, 189, quoted appellants' brief, pp. 19–20.

The controlling element in cases of this character is that the defendant does not have to exhibit boring sheets. If he does so, the law presumes that it was done to affect the bids and that they were made in reliance upon the representations.

"We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government *as a basis of the contract* left in no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants *it might easily have omitted the specification as to the character of the filling back of the dam.*"

Hollerbach v. *United States*, 233 U. S. 165, 172.

"*In making their tender* I hold that they were under

essential error, induced by misrepresentations as to the bores * * * ."

Boyd and Forrest v. *Glasgow, etc. Rwy.* 1914, 1 Scots Law Times Reports, 176, 182, appellants' brief, p. 20.

See, also, the cases quoted and cited in appellants' brief, pages 12–23, 26–27.

Appellee would distinguish (pp. 22–25 of its brief) the case of *Pearson* v. *Dublin Corporation* (quoted by appellants, pp. 12–16 of their brief) on the theory that it was "apparently" an "attempt" to prove fraud, whereas the Court of Claims has no jurisdiction over tort.

We submit that a misrepresentation in a contract is a breach of the contract as well as a tort and the plaintiff's election of his remedy does not negative the controlling principle of law. If false statements are *knowingly* made (regardless of the motive) there is misrepresentation, and the complete ignorance or innocence of an intermediate agent is immaterial.

Pearson v. *Dublin Corporation*, 1907 Appeal Cases, 351, 353, 354, 361, quoted appellants' brief, pp. 13–14.

"If these conditions [the representations by the boring sheets] were not complied with I think there was misrepresentation * * * however innocent may have been the motive * * * ."

Boyd and Forrest v. *Glasgow, etc. Rwy.* 1914, 1 Scots Law Times Reports, 176, 180, appellants' brief, p. 18.

Appellee (pp. 25–9 of its brief) attempts to distinguish the case of *Boyd and Forrest* v. *Glasgow, etc. Railway* (quoted by appellants in their brief, pages 16–21) on the ground that (1) the contractors in the case had only two weeks to make their estimate and so had no opportunity to correct the misrepresentations and (2) that, in that

case, there was a direct changing of a positive known fact.

As to these:

First. Subtracting time for travel and for preparation of the bids, it appears that the contractors at bar had less than two weeks, in which appellee demands that they should have done the boring which occupied the Government party almost four months. In the very case which appellee thus "distinguishes" the court held that there was no obligation to investigate, even though the contract warned bidders to do so. See quotations from the opinions, appellants' brief, pages 17–18, 19.

Appellee (pp. 29–35 of its brief) relies upon the cases of *Simpson* v. *United States* (172 U. S. 372) and *Sanitary District of Chicago* v. *Ricker* (91 Fed. 833). Those cases are not in point.

The first related to boring sheets which were *not referred to in or made a part of the contract* and the court held that the written contract entered into after the contractors had inspected the sheets merged all previous negotiations and eliminated the sheets from the contract. See discussion of that case in *Hollerbach* v. *United States*, 233 U. S. 165, 169–70.

The case of *Nesbit* v. *Railroad Company*, quoted in appellee's brief, pp. 35–6, is less in point. It related to an attempt to change the specific provisions of a contract by reference to an alleged engineering practice *which was nowhere referred to in the contract.*

III. Erroneous Angles of Repose.

Appellee's argument on this item is divided into five parts. Of these in their order:

1. Appellee argues (its brief, pp. 37–39) that the engineer officer was authorized to select the angle of

repose and his selection can not be disputed in the absence of a finding charging bad faith.

The single paragraph of the specification (48, Record, pp. 27–28) *agreed* that all excavations were to conform to lines, slopes and grades fixed by the engineer officer but the limits and quantities of excavation " will depend upon the ascertained angles of repose." It shows that the excavations were to be made *from the banks*. Instead of fixing an angle of repose at which the banks would stand, the engineer officer fixed an arbitrary angle of 1 on 1 at which the banks did not stand and let them slough off and compelled the contractors to remove the material in the form of mud and water in the lock pits instead of excavating it as dry earth from the banks. There were 45,000 cubic yards of this sloughed mud and it cost, to remove it, $1.00 per yard more than it would have cost to excavate it from the banks. The engineer officers gave their opinion that there was no angle of repose. The work was ultimately completed when the banks, after sloughing off this vast amount, found their angles of repose. See citations to the record in appellants' brief, pages 29–31 and top of page 34 and page 41.

Under these circumstances, either the engineer officer did not perform the contract of the United States by fixing the line according to the angles of repose, as agreed, or the specifications represented that there " will " be angles of repose at which the lines of excavation will be fixed when there were no such angles. In either event, there was a breach of contract (see appellants' brief, pp. 32–33).

It is more significant that appellee does not now follow the court below in its conclusion of law that the fixing of the angle was in the discretion of the engineer officer under paragraph 89 of the specifications (Record, p. 38)

giving that officer the right to correct errors or omissions in the contract, or under paragraph 78 (Record, p. 36) giving that officer the final decision in all cases of "dispute" with reference to inspection, workmanship and materials.

Appellee abandons that contention and bases the discretion of the officer upon paragraph 48 of the specifications (Record, p. 27) which provides that the excavations shall be to lines, slopes and grades "as may be given by the Engineer Officer" and then provides that the limits and quantities "will" depend upon "the ascertained angles of repose" and might be "greater or less" than shown by the drawings or given in the contract.

That paragraph (48) does not grant unlimited discretion. On the contrary, it restricts, by specific words, the officer's discretion; it compels him to fix the lines of excavation according to ascertained angles of repose with varying quantities according to conditions. This unusual provision accords with the unusual character of the river as being subject to unusual floods—more uncertain than the Chagres (appellants' brief, 40–41). Neither that paragraph nor paragraphs 78 and 89 gave the engineer officer any discretion to fix any angle other than an angle of repose. See cases cited, appellants' brief, pages 34–36 and argument, pages 31–37.

But granting, *arguendo*, that those paragraphs did give discretion to the engineer officer, we submit that his choice of an arbitrary angle in derogation of the specific agreement of the specifications was a "mistake," or an error and abuse of discretion, so gross as to constitute "fraud."

True, the court below did not find fraud, and did rule, as a matter of law, that the acts of the officer, under the circumstances, failed to constitute "fraud." But the

court below found the facts as hereinbefore outlined and those facts, on this appeal, show so gross an error as to constitute, in law, a "fraud or mistake," in breach of the specific requirement and representation of the contract.

As to the three cases cited by appellee, page 39 of its brief, the first two concerned a specific agreement, or term of the contract, that an officer should have absolute power to determine a distance traveled or the length of an extension of time to perform the contract, whereas, at bar, the specification limited the officer's discretion, and his action was in derogation, not in performance, of the contract provisions.

The last case cited by appellee is without bearing on the question herein.

2. Appellee argues (pp. 40–1 of its brief) that the court below found that the banks would have stood at 1 on 1 *if* there hadbeen no rises in the river, but that no angle would have stood under the rises in the river.

We have shown in appellant's brief, pp. 39–42, that rises and floods were expected and usual in this river. What then is the relevance of a finding and angle which ignores those conditions?

We have shown in appellants' brief, pp. 41 and top of 33 (see also Record, pp. 55, 77) that the sloughing could have been mitigated had a flatter angle been designated or the slopes protected by sheathing and that the banks did come to rest after the 45,000 cubic yards had sloughed off. The Government is liable for its breach of contract in designating an arbitrary angle and adhering to it without an effort to mitigate the damage to appellants or to perform the contract by seeking the angles of repose.

Appellee argues the finding of the court below that no angle could have been adopted at which the banks would have stood under the floods, *i. e.*, the condition of the

river. That "finding" (which is rather an opinion following that of Government officers) must be interpreted in the light of the remainder of the finding and of common experience. It then appears that the court found that some sloughing would have occurred, whatever the slope, but to no such extent as 45,000 cubic yards, some 14% of the entire excavation. Cliffs of rock do not remain in absolute repose—they fall and wear away through the years. The contract did not require "absolute" repose.

But if it be true that, in the opinion of the Government officers, there was no angle of repose, whereas the tender was made and the contract entered into on the agreement that the Government would fix the lines of excavation at the angles of repose, then the contractors can recover for the false representation and the Government's failure to attempt performance, to the extent of the cost of removing the sloughed material.

Counsel for the Government argues from convenience that it would have taken more time to remove the earth from the bank to a flatter angle and that the contractors would have objected. This is a curious misapprehension. There was the same amount of earth whether it stood in the banks or lay as sloughed mud in the lock pits. It took infinitely more time, and cost $45,000 more, to remove *that same* quantity from the lock pits than it would have to excavate it from the banks. See the opinion of engineers (appellants' brief, pp. 37, 38–39).

3. Appellee argues (pp. 41–44 of its brief) that the angle of 1 on 1 (erroneously called "the angle of repose") would have stood under ordinary conditions and therefore appellants can not ask damages and, second, that appellants made no protest and, third, there were pencil cross-section sheets on file in the government office at Tuscaloosa showing "different angles" of slopes "substantially" at 1 on 1.

As to these:

First. The slope of 1 on 1 did not stand (appellants' brief, p. 30), and flood conditions were not abnormal on the river (see appellants' brief, pp. 39–41). The record shows that the angle of 1 on 1 was chosen by the engineer officers with reference to work in localities far removed from Alabama. (See citations, appellants' brief, p. 39.)

Second. As hereinbefore pointed out, the appellants did protest verbally against the angle of 1 on 1, and also requested permission to sheath the banks, and those requests were in writing. A protest in writing is not prerequisite to a suit for breach of contract. There was no requirement in the contract as to protest. (See appellants' brief, pp. 46–7).

Third. Cross-section sheets with tentative pencil slopes drawn on them which formed no part of the contract and were not referred to therein are absolutely without effect upon the rights of either party to the contract. (See cases cited in appellants' brief, pp. 43–5, and the cases now cited by *appellee* in its brief, pp. 29–34.)

Fourth. Appellee argues (pp. 44–7 of its brief) that because the sloughed material came from behind the line (angle of 1 on 1) fixed by the engineer officer, appellants were not entitled to the payment even of the contract price for removing it from the lock pits, because paragraph 48 of the specifications provided that anything taken out beyond the limits of excavation would not be paid for.

Such argument stands only if an angle of 1 on 1 was *compliance with the contract* or was a proper designation under the terms of the contract. That question has already been considered.

The *Bowers* case cited by appellee (pp. 46–7 of its brief) is not in point, because it involved a contract

which placed the limits of excavation in the absolute discretion of the officers of the United States *and contained no contract provision whatever that limited the officer's discretion and the lines of excavation to the ascertained angles of repose.*

Fifth. Appellee's argument (pp. 47–8 of its brief) that the Government is not liable for the cost of recovering forms which were buried by the sloughed material, because the Government was not responsible for the "material" being "at that place," depends upon whether the fixing of the arbitrary angle of 1 on 1 was a performance or breach by the Government of its agreement to fix the excavation at the ascertained angles of repose. If the Government broke its contract by arbitrarily fixing the angle of 1 on 1, then the Government is responsible for the falling of the material onto the forms and should pay the damage which resulted from its breach of contract. See appellants' brief, pp. 39 (top) and 47–48.

IV. Construction of Cofferdams.

Appellee argues (pp. 43–53 of its brief) that the Government was not responsible for cofferdams which the engineer officer in charge decided was extra work which should be paid for according to a contract agreed to by the parties. We are willing to let this item stand on the inconsistency of appellee's argument claiming complete discretion in the engineer officer as to one item while denying it to him on another item and upon our argument and citations, appellants' brief, pages 48-52.

Conclusion.

Unless the Government is relieved in its contracts from the burden of any representations it may make, which would render all specifications in its contracts meaning-

less and void, the appellants are entitled to recover their damages for the false boring sheets.

Unless the Government's contracts lack every element of mutuality and constitute mere unilateral agreements, the appellants are entitled to recover their damages for the erroneous angle of excavation.

To deny recovery on both items simply tears up all Government contracts. They become a naked agreement to do such work, not specified, as the engineer officer may direct at a certain place for unit prices.

A contractor—and this is not a fanciful illustration—can stand at the Southwest Pass of the Mississippi River and see a hurricane destroy his completed work at the rate of $1,000 per minute and then, after an hour's destruction, he will start again, undismayed by the natural hazards of his undertaking. But when he finds that the Government has exhibited false boring sheets, and it costs him many thousands of dollars, or when he sees an angle of excavation fixed by a Government officer on the basis of an arbitrary opinion contrary to the express provisions of the contract, and it costs him $45,000, he feels, and rightly feels, that the contract has been broken.

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